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By ECF

Hon. Shelley C. Chapman  
 U.S. Bankruptcy Court  
 Southern District of New York  
 One Bowling Green  
 New York, New York 10004-1408

May 29, 2019

Confidentiality Designations in *In re Perforadora Oro Negro, S. de R.L. de C.V.*, Case No. 18-11094 (SCC) (jointly administered) – Corrected Copy

Dear Judge Chapman:

We write on behalf of AMA Capital Partners, LLC, Alterna Capital Partners, LLC, and Contrarian Capital Management, LLC (collectively, the “Interested Parties” or “Producing Parties”) in response to the Foreign Representative’s May 14, 2019, letter challenging certain of the Interested Parties’ confidentiality designations (the “Designation Letter”). (ECF No. 194.)

The Foreign Representative’s request that the Court order the Interested Parties’ documents be de-designated turns on whether the documents qualify for confidential treatment under the Confidentiality Agreement and Stipulated Protective Order (the “Protective Order”) (ECF No. 104 ¶ 24).<sup>1</sup> See *City of Hartford v. Chase*, 942 F.2d 130, 134 (2d Cir. 1991) (explaining that the confidentiality order “must be construed according to general principles of contract law”). But he has yet to articulate any basis why the challenged documents do not fall within one of the two standards for confidential

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<sup>1</sup> Capitalized terms not defined herein have the meaning set forth in the Protective Order. In accordance with paragraph 24 of the Protective Order, this response is limited to three pages in length.

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treatment<sup>2</sup>—in fact, the Designation Letter identified 28 documents the Foreign Representative has not previously raised with the Interested Parties in prior exchanges, as well as 39 documents the Interested Parties already de-designated in the interest of narrowing the parties’ disputes. Nor has he informed the Interested Parties to what use he intends to put the challenged documents.

The Foreign Representative has challenged hundreds of documents, each of which contains varying types of information appropriately designated as “Confidential” or “Highly Confidential” under the Protective Order. The Interested Parties have satisfied the “baseline showing of good cause” to maintain the confidentiality of such documents. *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 621 F. Supp. 2d 55, 62 (S.D.N.Y. 2007); *see also S.E.C. v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (explaining that “[w]ithout an ability to restrict public dissemination of certain discovery materials that are never introduced at trial, litigants would be subject to needless “annoyance, embarrassment, oppression, or undue burden or expense.”).<sup>3</sup> For example:

- 12 documents contain bank account numbers or tax ID numbers—information that clearly qualifies as “Confidential”;

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<sup>2</sup> The Designation Letter only cites one of the two applicable standards for confidential treatment under the Protective Order. In addition to “Confidential” treatment, the Protective Order defines “Highly Confidential” material as material that

constitutes or contains proprietary or commercially sensitive technical, business, financial, or other information subject to Federal Rule of Civil Procedure 45(d)(3)(B) or Bankruptcy Rules 9016 or 9018; or is subject by law, including foreign law, or by contract to a legally protected right of privacy; or the Producing Party is under a preexisting obligation to a third-party to treat as confidential; or such Discovery Material is highly personal in nature or is of such a nature that a risk of competitive injury would be created if such Discovery Material were disclosed to persons other than [specified individuals].

(Protective Order ¶ 5(b).)

<sup>3</sup> We note that the presumption of public access to judicial documents under the standards articulated in *Lugosch* does not apply to discovery documents exchanged between parties pursuant to a protective order. *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995); accord *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2007) (explaining that the common law right of public access applies to “judicial documents”).

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- 18 documents reflect commercial information about legal services rendered by attorneys for their clients—including both amounts and services billed—that likewise qualifies as nonpublic financial information;
- 44 documents reflect negotiations about contractual terms in engagement or other agreements, which constitute commercially sensitive business information and, in some instances, is subject to contractual confidentiality obligations; and
- 12 documents are non-public filings and orders in the Mexican criminal actions, for which access is restricted under Mexican law. (See National Code of Criminal Procedure of Mexico Art. 218; Decl. of P. Almada ¶ 10 (ECF No. 129).)<sup>4</sup>

Finally, we note that while the Foreign Representative has disputed the confidentiality designations for 229 documents—thereby triggering the process for resolving those disputes under the protective order—the Foreign Representative has informed the Interested Parties on multiple occasions that he was treating the disputed documents as “not confidential” (ECF No. 194-3 at 2-3, 6, 8), and refused to revoke that position or confirm that he had respected the Interested Parties’ confidentiality designations pending the outcome of this dispute. Unilaterally disregarding a party’s confidentiality designations would itself violate the Protective Order. (See Protective Order ¶ 24.) Under the Protective Order, only the Court has the authority to order the removal of confidentiality designations. (*Id.*)<sup>5</sup>

Respectfully,

/s/ William Clareman

William Clareman

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<sup>4</sup> The Interested Parties are willing to submit a binder to the Court setting forth the basis for confidentiality of the challenged Discovery Materials on a document by document basis, as requested in the Designation Letter, and await direction from the Court concerning how to most effectively present the dispute to the Court for resolution.

<sup>5</sup> In light of the timing of the Foreign Representative’s challenges to the confidentiality designations relative to the U.S. Shareholders’ attempt to obtain access to confidential discovery material, we have informed the Foreign Representative that changes to the confidentiality designations are not a basis to circumvent the prohibition on Chapter 15 discovery being used in the NAFTA arbitration. (ECF No. 194-3 at 7.) The Foreign Representative has not denied that the confidentiality challenges are motivated by an attempt to provide discovery materials to the U.S. Shareholders, notwithstanding the clear prohibition in paragraph 37 of the Protective Order.